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IN THE

Supreme Court of the United States

October Term, 1962.

No. 825.

W. H. DUDGEON, an individual doing business as ALL STATES DRIVE-AWAYS AGENCY,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
Respondent,

and

NATION-WIDE DRIVE AWAY AGENCY, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

W. H. Dudgeon and Nation-Wide Drive Away Agency, Inc., Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The order of the United States Court of Appeals for the Ninth Circuit affirming the judgments of the United States District Court for the Southern District of California in each of the captioned cases are printed in Appendix A to this Petition; no opinion was filed in support of the said orders. The findings of fact, conclusions of law and judgments entered by the District Court for the Southern District of California in each of the cases are printed in Appendices B and C to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 16, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Are the defendants, in the operation of their automobile drive-away businesses, engaged in the transportation of property for compensation in interstate commerce over the public highways as common carriers by motor vehicle in violation of Section 206(a) of the Interstate Commerce Act, Part II, 49 U. S. C. § 306(a)?

STATUTES INVOLVED.

Section 203(a)(14) of the Interstate Commerce Act, Part II, 49 Stat. 544, as amended 49 U. S. C. § 303(a)(14) defines "common carrier by motor vehicle" as follows:

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property of any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I."

Section 206(a) of the Interstate Commerce Act, Part II, 49 Stat. 551, 49 U. S. C. § 306(a) provides in relevant part as follows:

> "Except as otherwise provided in this section and in Section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ."[1]

Section 222(b) of the Interstate Commerce Act, 49 Stat. 564, 49 U. S. C. § 322(b), provides as follows:

> "If any motor carrier or broker operates in violation of any provision of this part (except as to the reason-

1. The remaining portion of Section 206(a) is extremely lengthy and is not relevant to the issues raised herein.

ableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates for the enforcement of such provision of this part, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto."

STATEMENT OF FACTS.

These are suits instituted by the Interstate Commerce Commission pursuant to Section 222(b) of the Interstate Commerce Act, Part II, 49 U. S. C. § 322(b) to enjoin petitioners from conducting an auto drive-away business, without a certificate of public convenience and necessity, permit or other authority from the Commission, in violation of Sections 206(a) and 209(a) of the Interstate Commerce Act, Part II, 49 U. S. C. §§ 306(a) and 309(a). The complaints alleged that petitioners' operations constituted transportation of property for compensation in interstate commerce over the public highways as a common or contract carrier by motor vehicle and, therefore, were within the certification requirements of the aforesaid provisions. Petitioners denied that they were engaged in any activities covered by the Act and affirmatively averred that they performed non-transportation services for the owners of motor vehicles.

The cases were tried separately [2] without a jury before Judge William Byrne of the United States District Court for the Southern District of California, on April 11, 1961 and were submitted upon the agreed statements of facts contained in the pretrial orders and certain additional evidence adduced at the trial. In both actions, the Court concluded that the petitioners were engaged in the transportation of property in interstate commerce as a common carrier by motor vehicle without a certificate of public convenience and necessity in violation of Section 206(a) of the Interstate Commerce Act, 49 U. S. C. § 306(a), and issued decrees en-

2. *Interstate Commerce Commission v. W. H. Dudgeon, an individual d/b/a All States Drive-Aways Agency*, No. 422-60-WB and *Interstate Commerce Commission v. Nation-Wide Drive-Away Agency, Inc.*, 425-60-WB. A third action, *Interstate Commerce Commission v. H. Thomas Klein*, No. 423-60-WB, was tried at the same time, but the defendant in that matter terminated his business subsequent to the appeal and certiorari is not being requested in that case.

joining the petitioners from such activities. The judgments of the District Court in both actions were appealed to the United States Court of Appeals for the Ninth Circuit and execution on such judgments were stayed by order of Judge Byrne on December 1, 1961. On November 16, 1962, the Court of Appeals, by summary order and without a formal opinion, affirmed the judgments of the District Court in both cases.

Basically, petitioners' methods of operations are similar and the facts presented in each case were not significantly different. In brief, the nature of the auto driveaway businesses conducted by each of the petitioners was shown to be as follows: An automobile owner who desires to have his vehicle driven from one location to another, but is unable to do so himself, authorizes one of the petitioners to select a reliable driver who will drive the vehicle for the owner. The petitioner secures such a driver, examines his character references and otherwise investigates his fitness and reliability. If a driver is found to be qualified, he is authorized by the owner, or the petitioner as agent for the owner, to drive the owner's vehicle to the specified destination.

The petitioner obtains automobile owners as clients by advertising in newspapers, the yellow pages of the telephone directory and through other advertising media. Generally, the drivers selected are travelers, seeking reduced transportation costs to the automobile's destination, who have registered with the petitioners as a result of their knowledge of petitioners' business as advertised. The petitioner does not employ any of the drivers and, after the trip is commenced, has no other contact or relationship with the drivers.

A portion of the fee charged by the petitioner for the aforesaid services is paid to the petitioner by the owner at the time the petitioner is authorized to select a driver and the balance, normally $50.00, is paid to the driver upon safe delivery of the vehicle to its destination. The owner

has the right to withhold the said amount in the event that the vehicle is damaged in transit as a result of the fault of the driver. The petitioner, on the other hand, by requiring payment of the balance of the fee from the driver before approving the driver as qualified, does not bear any portion of the loss caused by the driver. All other risks of loss to the vehicle or injury to the driver are likewise expressly assumed by the owner and the driver and the petitioner maintain no liability insurance whatsoever for their benefit. The petitioner undertakes no other responsibility with respect to the movement of the vehicle, and the expenses of the trip, including gas, oil, food and accommodations, are fully paid by the owner or driver.

REASON FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in the instant case because:

(1) There is involved an important question concerning the application of a regulatory federal statute which has not been decided by this Court.

(2) The Court's decision that the services provided by petitioners were subject to regulation under Part II of the Interstate Commerce Act is in conflict with the opinion of the United States Court of Appeals for the Tenth Circuit in *B. & C. Truck Leasing, Inc. v. I. C. C.*, 283 F. 2d 163 (1960).

I. The Question Raised by the Instant Petition Is an Important One Which Should Be Decided by This Court.

As this Court has recently recognized,[3] Congress, in enacting Part II of the Interstate Commerce Act, 49 U. S. C. §§ 301-327, balanced the need to regulate certain aspects of the transportation industry against the "shipper's interest in furnishing his own transportation"; and exempted such private carriage from the licensing requirements of the Act. Correlatively, Congress, by defining a common or contract carrier by motor vehicle as a person who engages in "transportation," has further exempted from the licensing provisions of the Act persons who do not participate in the actual movement of passengers or property, but merely perform non-transportation services for those who do. The proper delineation between those activities which are subject to licensing under the Act and the activities exempt therefrom is essential to the sound functioning of our free enterprise economy. It is submitted that the United States Court of Appeals for the Ninth Circuit, by affirming the

3. *United States v. Drum*, 368 U. S. 370, 372 (1962).
4. 49 U. S. C. § 303(a)(15).

district court's decision that the petitioners were common carriers by motor vehicle within the meaning of Section 206(a) of the Interstate Commerce Act, 49 U. S. C. § 306(a), has applied the licensing provisions of the said Act to organizations providing non-transportation services to private carriers which were never intended to be regulated by Congress. At the very least, the Court has extended the coverage of the Act to organizations whose operations are outside the scope of any activity previously held by this, or any other, Court to be subject to such regulation and for this reason the decision of the said Court of Appeals should be reviewed by this Court.

The importance of the decision below is not limited to its effect, however severe, upon the petitioners. The conclusions of the district judge are sufficiently broad to place under the regulatory power of the Interstate Commerce Commission the approximately 250 other auto drive-away owners, most of whom are small independent businessmen, who conduct their operations much in the same manner as do the petitioners. In view of the Commission's reluctance in the past to issue certificates of public convenience and necessity to the auto drive-away agencies,[5] it is extremely unlikely that they will be permitted to remain in business if the decision below were to stand.

This result would be disastrous not only to the persons who strive to earn their living through the auto drive-away business, but would deprive their clients, many of whom are elderly or otherwise physically prevented from driving long distances, of the only reasonable means available of bringing their automobiles with them when they move or go on vacation. The present means of automobile transportation, being geared to the large scale commercial shipments, are unable to maintain the frequency of service or reasonable rates necessary to accommodate these automobile owners, and they are required to locate drivers who will drive their

5. See, e.g., *A. A. Auto Delivery, Inc.*, 77 M. C. C. 365; *Fred D. Spencer, d/b/a A. A. Delivery*, 88 M. C. C. 243; *Service Associates, Inc.*, 89 M. C. C. 33.

vehicles for them at rates they can afford. Because of their volume, experience and skill, the auto drive-away operators, such as petitioners, are able to secure and screen reliable drivers more efficiently than the private automobile owner and, consequently, have been sought out by the owners to assist them in carrying out what remains essentially a private transportation by the owner of his own automobile. It is submitted that the automobile owner's right to arrange, with the petitioners' assistance, for the movement of his vehicle under his control should not be curtailed without more justification than is found in the findings and conclusions of the district court below.

II. Petitioners Are Not Engaged in Transportation—Conflict in Circuits.

Petitioners have contended throughout the proceedings below that, in the conduct of their auto drive-away businesses, they act only as an intermediary bringing together the private automobile owners and drivers and do not provide a transportation service. The entire crux of the evidence presented to the district court was that the driver's authority to drive the owner's vehicle was derived from the direct contract between the owner and driver and that the petitioners maintained no control over the driver's operation of the vehicle once the trip had commenced. The court, in holding that the petitioners performed substantially all of the functions of transportation,[6] discounted the form of the petitioners' procedures on the ground that they did not indicate the true substance of the transaction, and concluded as a matter of law that the petitioners controlled the driver during the course of the actual movement of the vehicle.[7]

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6. Conclusion 9 in the *Dudgeon* case, p. 22 *infra* and Conclusion 8 in the *Nation-Wide* case, p. 31 *infra*.

7. Conclusion 7 in the *Dudgeon* case, p. 22 *infra* and Conclusion 6 in the *Nation-Wide* case, p. 30 *infra*.

There is absolutely no support whatsoever in the record for these conclusions by the court. Certainly, the petitioner retained none of the indicia or risks of transportation which this Court recognized in *United States v. Drum*, 368 U. S. 370 (1962), as transcending the nature of the formal arrangements involved therein. Petitioners' compensation, having been collected in full prior to the commencement of the trip, is not dependent upon the successful completion thereof, and petitioners expressly disclaim all other responsibility for the costs of the movement or for the safe delivery of the vehicle.

Furthermore, the district court's conclusion that the petitioner retained supervision over the drivers cannot be reconciled with the court's specific finding of fact[8] that the driver was instructed to contact the owner, not the petitioner, in the event of an emergency occurring in route. Indeed, since the drivers secured by petitioners are for the most part casual travelers who do not return immediately, if ever, to the vicinity of petitioners' offices, petitioners have no means of controlling their actions once the trip has commenced. On the other hand, the owner, by having the right to withhold reimbursement of the driver's deposit, possesses the only effective means of insuring that the driver follows the directions given him and operates the owner's automobile in a safe and proper manner.

In view of the absence of any evidence of actual control, the decision of the district court, as affirmed by the Court of Appeals, appears to be based upon the reasoning that any person who supplies drivers to an automobile owner for the purpose of operating the owner's vehicle retains some sort of constructive control over the drivers so as to become subject to the Interstate Commerce Act. It is submitted that in this respect the said decision is in conflict with the opinion of the United States Court of Appeals for the Tenth Circuit in *B & C Truck Leasing, Inc.*

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8. No. 6 in the *Dudgeon* case, p. 17 *infra* and No. 5 in the *Nation-Wide* case, p. 26 *infra*.

v. I. C. C., 283 F. 2d 163 (1960), where Judge Bratton made the following statement relevant to the question presently before this Court (at 165):

> "One engaged exclusively in leasing trucks for use by others in the transportation of their own property on the highways or *one engaged solely in furnishing drivers to drive trucks for others in the transportation of their own property on the highways, without more, is not required to obtain a certificate of convenience and necessity.* . . ."[9]

The petitioners and the other auto drive-away operators have founded and conducted their businesses upon the belief that the above statement represents the true state of the law and intent of Congress and they should not be deprived of their freedom to continue, without restriction, the conduct of such businesses, in the absence of a definitive holding by this Court that they are common carriers by motor vehicle within the meaning of Section 206(a) of the Interstate Commerce Act.

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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9. Judge Fee of the Ninth Circuit expressed a similar view while sitting as district judge for the United States District Court for the District of Oregon in *I. C. C. v. Vinze*, 12 Federal Carrier Cases, Para. 81,112 (1956).

APPENDIX A.

Order of United States Court of Appeals for the Ninth Circuit Denying Motion to Dismiss and Affirming Judgments in W. H. Dudgeon, an Individual, Doing Business as All States Drive-Aways Agency v. Interstate Commerce Commission, No. 17827 and Nation-Wide Drive Away Agency, Inc. v. Interstate Commerce Commission, No. 17829.

The motion of appellee to dismiss appeal in above cause No. 17827 and the causes on merits in each of above cause coming on this day for hearing, and there being no appearance on behalf of the appellants, Mr. William Harrison, Attorney, Interstate Commerce Commission appearing on behalf of the appellee, IT IS ORDERED that said motion to dismiss in Case No. 17827 be and hereby is, denied; and IT IS FURTHER ORDERED that the judgment of the said District Court in each of above causes be and each of them hereby is affirmed.

Judgment in No. 17827.

Appeal from United States District Court for Southern District of California, Central District. This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central District, and on motion to dismiss appeal and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the motion to dismiss be and hereby is denied and that the judgment of the said District Court in this cause be and hereby is affirmed.

Judgment in No. 17829.

Appeal from United States District Court for Southern District of California, Central District. This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central District and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and hereby is affirmed.

APPENDIX B.

Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Southern District of California, Interstate Commerce Commission v. W. H. Dudgeon, an Individual, Doing Business as All States Drive-Aways Agency, No. 422-60-WB.

BYRNE, *District Judge.*

This cause came on for trial before the court without a jury. The plaintiff appeared by its attorney, William L. Harrison, and the defendant, W. H. Dudgeon, appeared by his attorney, Edward K. Brody. The case was submitted upon an agreed statement of facts contained in the Pretrial Order and additional evidence was adduced at time of trial. Briefs were filed by both parties. The court being advised in the premises makes its findings as follows:

FINDINGS OF FACT.

1.

The jurisdiction of this court is invoked under the provisions of Part II of the Interstate Commerce Act, (49 U. S. Code 322(b)). The plaintiff seeks to enjoin and restrain the defendant from transporting automobiles, in driveaway service, in interstate commerce, for compensation, as a common or a contract carrier, without having been issued to him a certificate of public convenience and necessity or permit by the Commission authorizing him to engage in such operations or business.

2.

Defendant maintains an office and place of business in the City and County of Los Angeles, California. He has been engaged in the "driveaway" business since ap-

proximately March 15, 1957, and he is presently engaged in such business.

3.

Defendant advertises his business to the general public. He utilizes the yellow pages of the Los Angeles Telephone Directory, circulates the usual type of business cards, distributes ball-point pens and displays advertising on his private business automobile. These advertisements note as follows: "Car Delivered Anywhere", and "Automobile delivery service to anywhere in the United States". Also, the advertisements carry the statement: "Bonded—Insured".

4.

Defendant utilizes business forms and contracts in the consummation of any one transaction as follows: (1) contract with the owner, (2) a driver's application form, and (3) a lease agreement. The forms, the terms, conditions and restrictions contained therein, are composed, prepared and printed by defendant. Substantially, the base arrangements in each transaction are those between the defendant and the car owner, and those between the defendant and the driver. Defendant testified that upon initial inquiry by a car owner the contracts were displayed and the contents thereof were fully explained. Upon acceptance of the terms by the owner and delivery of the car to the defendant a receipt for the car is issued by the defendant.

5.

With respect to the arrangement with the owner, defendant's contract states that the car has been released to him "for the purpose of selecting a reliable driver for a one-way trip from (origin to destination)". The contract also provides that title or ownership papers rest with

the legal owner and the car is properly licensed and registered; that defendant "will be responsible for the first $50.00 only"; and, that "all necessary repairs, adjustments, oil or anti-freeze necessary, plus all caravan and port of entry fees assessed by states necessary to pass through will be at owner's expense. In event there should be a complaint of any nature, please withhold payment and contact our office immediately". The contract is signed by the owner as "shipper" and by the defendant as "agent".

6.

Defendant's arrangement with the driver is consummated under a "lease agreement" wherein defendant, as "agent" of the owner, leases the car, for the duration of the trip, to the driver. The contract utilized makes it appear that the driver is in privity with the owner through the intervention of the defendant acting as "agent" for the owner. Drivers agree to pay for their own meals, lodging, oil and gasoline and the usual highway or bridge tolls. The driver is given instructions as to the highways to be traversed, the number of miles to be traveled, and the date of delivery. He is directed to call the owner at destination in case of emergency. Provisions are contained as to passengers, if any, who may be transported, as to compliance by the driver with the local state regulations and as to payment for minor repairs. The driver waives any claim against both the defendant and the owner for any injury sustained. Additionally, the driver is advised and instructed by defendant as to any mechanical peculiarities or special handling required of a car as reported by the owner. A deposit of money is required to be made by the driver with the defendant to insure safe and timely delivery of the automobile with the provision that if no loss or damage occurs an equal sum of money will be "refunded" by the owner at destination.

7.

Drivers are secured and "screened" by defendant. They are secured from lists maintained by the defendant or in some cases the defendant will advertise for a driver. Generally, drivers are available and register with defendant because of the common knowledge of the business as advertised and they seek reduced transportation costs from the Los Angeles area to various points in the United States to which they desire to travel. The screening substantially consists of securing the identification of a driver, past employment, inquiring into his driving qualifications and requiring that he furnish references. In some instances, the driver has not been introduced to the owner of the car, has never had any conversation or other course of dealing with an owner prior to his departure with a car. His only meeting with the owner is at point of destination when the car is delivered. In some instances, when an owner has so requested, the defendant has introduced the driver to the owner.

8.

The evidence discloses that defendant bases his charges for service upon the distance traveled. At times, he may reduce the charge when a potential customer indicates that lower rates are available from competitors. In the instant case, from Los Angeles, defendant charged and collected for delivery to: New York—$100.00, Philadelphia—$95.00, Tennessee—$75.00, and Chicago—$60.00.

9.

When the car is released to the defendant, the owner pays the difference between the total quoted price and $50.00. When the car is turned over to the driver, the driver pays the defendant the sum of $50.00. In this manner the defendant receives his full price for the service. When the car is delivered to the owner, he "refunds" the driver his $50.00, except in case of loss or damage the cost thereof may be subtracted from the amount due the driver

up to $50.00. In this manner the owner pays the quoted price for the service and secures his "bonded" protection up to $50.00. Also, the defendant's contract with the driver had been fulfilled.

10.

A representative transaction is as follows. On the 22nd day of September, 1959, owner Mrs. W. J. Heinz made arrangements with defendant to have her car delivered to New York City, New York. Defendant quoted a charge of $100. Upon delivery of the automobile to defendant, Mrs. Heinz paid $50.00. One Irving Handle was selected and screened by defendant to drive this automobile and the car was turned over to him to drive under a "lease agreement". Handle deposited $50.00 with defendant. Upon delivery of the car at New York, driver Handle received a refund of $50.00 from the owner thereof. Defendant received the sum of $100 for his services in connection with the delivery of this car to Mrs. Heinz from Los Angeles to New York City.

11.

Defendant does not provide personal injury and property damage insurance. He expressly disclaims to assume such obligation at the time of his initial arrangement with the owner.

12.

Defendant contends that his business undertaking is in the nature of an employment agency in seeking out and screening drivers for automobile owners and that he is not a common carrier or a contract carrier as defined in the Interstate Commerce Act, Part II, and therefore, is not subject to the jurisdiction of the Commission.

13.

Defendant does not possess, nor has he possessed, a certificate of public convenience and necessity, a permit or any other authority issued by the Interstate Commerce

Commission authorizing him to engage in such operations or business.

14.

The defendant intends to and will in the manner and form aforesaid, or otherwise, continue to engage in a driveaway service involving the delivery of automobiles moving in interstate commerce without having first obtained from the Commission a certificate as a common carrier or a permit as a contract carrier authorizing him to engage in such operations and business unless restrained by this court.

II.

CONCLUSIONS OF LAW.

1.

This court has jurisdiction over the subject matter and of the defendant under and by virtue of the provisions of Part II of the Interstate Commerce Act (49 USC 301, et seq.), and particularly under Section 222(b) thereof, (49 USC 322(b)) and the general laws and rules relative to suits in equity.

2.

Part II of the Interstate Commerce Act is a highly remedial statute, and its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire, (*Georgia Truck System, Inc. v. Interstate Commerce Commission*, 123 F. Sec. 210). The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose. (*McDonald v. Thompson*, 305 U. S. 263; *Piedmont and N. Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299.)

The documents, agreements and contracts utilized by defendant appear to be designed to avoid the application

of the provisions of the Interstate Commerce Act to the transportation performed and they are of no legal effect wherein the terms are in contradiction to the facts. The lease agreement employed by defendant wherein defendant "leases" the owner's car to the driver for the duration of the trip, is not a bona fide lease, but is a mere subterfuge under the guise of which defendant attempts to screen his unlawful operations.

4.

The fact that the charges for the service is related to the distance traveled, together with the fact that defendant can, and in many instances does, reduce the quoted rate to meet competition, discredits the contention that the rate charged is for screening a driver.

5.

The advertisements of the defendant constitute a holding out of an automobile transportation service within the meaning of Section 203(a)(14) of the Interstate Commerce Act, Part II (49 USC 303(a)(14)).

6.

There is an active concurrence or privity of contract between the owner of each automobile and the defendant, in the consummation of any one transaction. Although it is made to appear that the owner contracts with the driver for the transportation and delivery of his car, the initial terms and conditions surrounding each movement are prescribed by defendant with each individual owner. The defendant by his holding out, as well as by his verbal representations to each owner, undeniably establishes an expectation on the part of the owner that the defendant assumes to perform a transportation service. The owner accepts the defendant's terms and conditions, turns over to defendant his property and pays the defendant his quoted charge. The defendant assumes the right, power and duty to perform the service within the scope of his holding out.

7.

A driver is necessary to accomplish the terms of defendant's holding out. In order to accomplish this purpose, the drivers are not only selected by the defendant, but must necessarily be under his control during the course of transportation. The drivers receive their instructions from the defendant and they look to the defendant as their employer. In some instances, a special effort is made by the defendant to bring together the owner and the driver at the point of origin but the court considers this to be nothing more than a calculated maneuver to make it appear that the defendant has rendered only a driver "screening" service and that the contract of driving has been entered into between the owner and the driver. In so far as any individual trip is concerned, the driver is an agent or employee of the defendant and his employment during such time is under the supervision and control of the defendant.

8.

For each automobile transported the defendant charges and receives a definite sum of money from the owner thereof, and the receipt of such money is compensation within the meaning of Part II of the Interstate Commerce Act.

9.

The defendant furnishes substantially all of the facilities for, and performs substantially all the functions of transporting automobiles for individual owners, in driveaway service, in interstate commerce, for compensation, and is a common carrier by motor vehicle as defined in Section 203(a)(14) of the Interstate Commerce Act, Part II (49 USC 303(a)(14)). Such operations are subject to the certificate provisions of Section 206(a) of the Act (49 USC 306(a)).

10.

The acts of the defendant constitute violations of Section 206(a) of the Interstate Commerce Act (49 USC 306(a)), and as such, are subject to be enjoined by this court under the express provisions of Section 222(b) of said Act (49 USC 322(b)).

III.

JUDGMENT.

This cause having come on for trial, and the issues therein having been tried before the court without a jury and the evidence of the parties hereto having been heard, and the court having duly made findings of fact and conclusions of law;

It is hereby ordered, adjudged and decreed that the defendant, W. H. Dudgeon, an individual, doing business as All States Drive-Aways Agency, his agents, employees and representatives, and all persons acting by or under the direction or in active concert or in participation with said defendant, are hereby permanently enjoined and restrained from, directly or indirectly, transporting or arranging for the transportation of automobiles, in driveaway service, by motor vehicle, in interstate commerce, over public highways, for compensation, as a common carrier, until such time, if at all, as there is in force with respect to said defendant a certificate of public convenience and necessity or other appropriate form of authority issued by the Interstate Commerce Commission authorizing such operations.

Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and decree, and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree.

APPENDIX C.

Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Southern District of California, Interstate Commerce Commission v. Nation-Wide Drive Away Agency, Inc., a Corporation, No. 425-60-WB.

BYRNE, *District Judge.*

This cause came on for trial before the court without a jury. The plaintiff appeared by its attorney, William L. Harrison, and the defendant, Nation-Wide Drive Away Agency, Inc., a corporation, appeared by its attorney, Edward K. Brody. The case was submitted upon an agreed statement of facts contained in the Pre-trial Order. Additional evidence was adduced at time of trial. Briefs were filed by both parties. The court being advised in the premises makes its findings as follows:

FINDINGS OF FACT.

1.

The jurisdiction of this court is invoked under the provisions of Part II of the Interstate Commerce Act, (49 U.S. Code 322(b)). The plaintiff seeks to enjoin and restrain the defendant from transporting automobiles, in driveaway service, in interstate commerce, for compensation, as a common or a contract carrier, without having been issued to it a certificate of public convenience and necessity or a permit by the Commission authorizing it to engage in such operations or business.

2.

Defendant maintains an office and place of business in the City and County of Los Angeles, California. It has

been engaged in the "driveaway" business since approximately August 1, 1957, and is presently engaged in such business.

3.

Defendant advertises its business to the general public. It utilizes the Los Angeles Telephone Directory as well as both the Los Angeles Times and the Los Angeles Examiner. These advertisements note as follows: "Ship Your Car Anywhere", "Quick Dependable Service", "Offices in all principal Cities", "$100 Maximum Cost", and "Bonded—Insured".

4.

Defendant utilizes business forms and contracts in the consummation of any one transaction as follows: (1) an order form, (2) a driver's application form, and (3) a driver's agreement. The forms, the terms, conditions and restrictions contained therein, are composed, prepared and printed by the defendant. Substantially, the base arrangements in each transaction are those between the defendant and the car owner, and those between the defendant and the driver. Defendant's president testified that upon initial inquiry by the car owner the contracts are displayed and the contents thereof are fully explained. Upon acceptance of the terms by the car owner and delivery of the car to the defendant a receipt for the car is issued by the defndant. The defendant uses a printed order form, made in duplicate, one copy to the owner as a receipt. The form identifies the owner, the car, and states the destination point of delivery together with the charges and method of payment. It contains a provision: "How ship—Driveaway". The defendant does not make a written commitment to the owner to assume any liability for damages to the car during the course of transit. However, the owner is extended this protection and the method of handling is explained and it becomes part of the initial arrangement between the owner and defendant.

5.

The arrangement with the driver is consummated by the Driver's Agreement. This agreement designates the driver as an "independent contractor" whose only function is "for the sole purpose of delivery" of the vehicle. The contract makes it appear that the driver is in privity with the owner only. Drivers agree to pay for their own meals, lodging, oil and gasoline and the usual highway or bridge tolls. The driver is given instructions as to the highways to be traversed, the number of miles to be traveled, and the date of delivery. He is directed to call the owner at destination in case of emergency. Provisions are contained as to passengers, if any, who may be transported; and, as to transportation of articles in violation of law and as to compliance with local and state regulations. The driver waives any claim against both the defendant and the owner for any injury sustained. Additionally, drivers are advised and instructed by the defendant as to any mechanical peculiarities or special handling required of a car as reported by the owners. A deposit of money is required to be made with a defendant to insure safe delivery of the automobile with the provision that if no loss or damage occurs an equal sum of money will be "refunded" by the owner at destination. The driver's contract is signed by the owner at the time of the initial inquiry. The driver signs after he has been "screened" and selected.

6

Drivers are secured and "screened" by the defendant. Drivers are secured from lists maintained by the defendant or in some cases the defendant will advertise for a driver. Generally, drivers are available and register with defendant because of the common knowledge of the business as advertised and they seek reduced transportation costs from the Los Angeles area to various points in the United States to which they desire to travel. The screening substantially consists of securing the identification of a driver, past em-

ployment, inquiring into his driving qualifications and requiring that he furnish references. In some instances, the driver has not been introduced to the owner of the car, has never had any conversation or other course of dealing with an owner prior to his departure with a car. His only meeting with the owner is at point of destination when the car is delivered. In some instances, when an owner has so requested, the defendant has introduced the driver to the owner.

7.

The evidence discloses that defendant bases its charges for service upon the distance traveled. At times, defendant may reduce the charge when a potential customer indicates that lower rates are available from competitors. The usual charges from Los Angeles to points in the south, mid-east, and east vary from $60 to $100.

8.

When the car is released to the defendant, the owner pays the difference between the total quoted price and $50. When the car is turned over to the driver, the driver pays the defendant the sum of $50. In this manner the defendant receives his full price for the service. When the car is delivered to the owner, he "refunds" the driver his $50, except in case of loss or damage the cost thereof may be subtracted from the amount due the driver up to $50. In this manner the owner has paid the quoted price for the service and secured his "bonded" protection up to $50. Also, the defendant's arrangement with the driver has been fulfilled.

9.

A representative transaction is as follows. On September 15, 1959, owner Joseph Goodman made arrangements with defendant to deliver a 1953 Chrysler to Madison, Wisconsin, at an agreed price of $85. Upon accept-

ance of the car by defendant, the owner paid defendant the sum of $35. Defendant selected and screened one David D. Anderson, as a driver and turned the car over to him under the usual driver's agreement for delivery. Anderson deposited with the defendant the sum of $50. Upon delivery of the car, the owner refunded the $50 to Anderson. The defendant collected $85 for this service.

10.

Defendant does not provide personal injury and property damage insurance. It expressly disclaims to assume such obligation in its initial arrangement with the owner. Such insurance will be procured upon request of the owner and at his expense.

11.

Defendant contends that its business undertaking is in seeking out and securing drivers for an automobile owner, only, and that it is not a common carrier or a contract carrier as defined in the Interstate Commerce Act, Part II, and therefore, is not subject to the jurisdiction of the Commission.

12.

Defendant does not possess, nor has it ever possessed, a certificate or a permit issued by the Interstate Commerce Commission authorizing it to engage in such operations or business as either a common or a contract carrier. It intends to and will in the maner and form aforesaid, or otherwise, continue to engage in a driveaway service involving the delivery of automobiles moving in interstate commerce without having first obtained from the Commission a certificate as a common carrier or a permit as a contract carrier authorizing it to engage in such operations and business unless restrained by this court.

CONCLUSIONS OF LAW.

1.

This court has jurisdiction over the subject matter and of the defendants under and by virtue of the provisions of Part II of the Interstate Commerce Act (49 U. S. C. 301, et seq.), and particularly under Section 222(b) thereof, (49 U. S. C. 322(b)) and the general laws and rules relative to suits in equity.

2.

Part II of the Interstate Commerce Act is a highly remedial statute, and its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire (*Georgia Truck System, Inc. v. Interstate Commerce Commission*, 123 F. Sec. 210). The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose (*McDonald v. Thompson*, 305 U. S. 263; *Piedmont and N. Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299).

3.

The documents, agreements and contracts utilized are worded to establish the defendant as an "agent" of the owner, only, and the driver as an "independent contractor" for the purpose of avoiding any appearance of responsibility by the defendant. The agreements appear to be designed to avoid the application of the provisions of the Interstate Commerce Act to the transportation performed and they are of no legal effect wherein the terms are in contradiction to the facts. The fact that the charges for service is related to the distance traveled, together with the fact that defendant can reduce the quoted rate to meet competition, discredits the contention that the charges collected are for screening a driver, only.

4.

The advertisements of the defendant constitute a holding out of an automobile transportation service within the meaning of Section 203(a)(14) of the Interstate Commerce Act, Part II (49 U. S. C. 303(a)(14)).

5.

There is an active concurrence, or privity of contract between the owner of each automobile and the defendant in the consummation of any one transaction. Although it is made to appear that the owner contracts with the driver for the transportation and delivery of his car, the initial terms and conditions surrounding each movement are prescribed by the defendant with each individual owner. The defendant by its holding out, as well as by its verbal representations to each owner, undeniably establishes an expectation on the part of the owner that the defendant assumes to perform a transportation service. The owner accepts the defendant's terms and conditions, turns over to defendant his property and pays the defendant its quoted charge. The defendant assumes the right, power and duty to perform the service within the scope of its holding out.

6.

A driver is necessary to accomplish the terms of the defendant's holding out. In order to accomplish this purpose, the drivers are not only selected by the defendant, but must necessarily be under its control during the course of transportation. The drivers, in fact, receive their instructions from the defendant and they look to the defendant as their employer. A special effort is made by the defendant to bring together the owner and the driver at the point of origin but the court considers this to be nothing more than a calculated maneuver to make it appear that the defendant has rendered only a driver "screening" service and that

the contract of driving is entered into between the owner and the driver. In so far as each individual trip is concerned, the driver is an agent or employee of the defendant and his employment during such time is under the supervision and control of the defendant.

7.

For each automobile transported the defendant charges and receives a definite sum of money from the owner thereof, and the payment and receipt of such money is compensation within the meaning of Part II of the Interstate Commerce Act.

8.

The defendant furnishes substantially all of the facilities for, and performs substantially all the functions of transporting automobiles for individual owners, in drive-away service, in interstate commerce, for compensation, and is a common carrier by motor vehicle as defined in Section 203(a)(14) of the Interstate Commerce Act, Part II (49 USC 303(a)(14)). Such operations are subject to the certificate provisions of Section 206(a) of the Act (49 USC 306(a)).

JUDGMENT.

This cause having come on for trial, and the issues therein having been tried before the court without a jury, and the evidence of the parties hereto having been heard, and the court having duly made findings of fact and conclusions of law;

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant, Nation-Wide Drive Aways, Inc., a corporation, its officers, agents, employees and representatives, and all persons acting by or under the direction or in active concert or in participation with said defendant, are hereby

permanently enjoined and restrained from, directly or indirectly, transporting or arranging for the transportation of automobiles, in driveaway service, by motor vehicle, in interstate commerce, over public highways, for compensation, as a common carrier, until such time, if at all, as there is in force with respect to said defendant a certificate of public convenience and necessity or other appropriate form of authority issued by the Interstate Commerce Commission authorizing such operations.

Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and decree, and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce this decree.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 825

W. H. DUDGEON, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion. The findings of fact, conclusions of law and judgments of the district court (Pet. 15–32) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on November 16, 1962 (Pet. 13–14), and the petition for a writ of certiorari was filed on February 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly found that the drive-away operations conducted by petitioners con-

stitute for-hire transportation of automobiles in interstate commerce, for which operating authority must be obtained from the Interstate Commerce Commission.

STATUTE INVOLVED

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. 303(c), provides:

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, * * *.

Other relevant sections of the Interstate Commerce Act are set forth at pages 3 and 4 of the petition.

STATEMENT

This proceeding was instituted in the United States District Court for the Southern District of California by the Interstate Commerce Commission, pursuant to Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)), to enjoin the two petitioners from engaging in interstate for-hire transportation of automobiles without a certificate of public convenience and necessity issued by the Commission. Petitioners admitted that they were engaged in the operations described in the complaint, but denied that such operations constitute for-hire transportation. The district court held that each petitioner was engaged in for-hire

transportation by motor vehicle within the meaning of Section 206(a) of the Interstate Commerce Act, and enjoined if from doing so without Commission authority. The court of appeals summarily affirmed (Pet. 13–14).

There is no dispute as to the facts.[1] The operations of the two petitioners are substantially the same. Both maintain offices in Los Angeles, California, from which they conduct businesses known respectively as All States Drive-Aways Agency and Nation-Wide Drive Away Agency, Inc. They solicit the general public through advertisements in the local newspapers and in the Los Angeles telephone directory. Typical advertisements are: "Automobile delivery service to anywhere in the United States"; "Car Delivered Anywhere"; and "Ship Your Car Anywhere". (Pet. 16, 25).

Persons who wish to have their automobiles transported from Los Angeles to other points in the United States contact petitioners, who arrange for a driver to transport the car to its destination. Neither petitioner maintains a regular staff of drivers, but both maintain "lists of available drivers" (Pet. 18, 26). Petitioners "screen" prospective drivers, require them to furnish references, and inquire into their past driving experiences (Pet. 18, 26–27). Normally the driver does not meet the owner of the car until he delivers the car to its destination (Pet. 18, 27).

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[1] Both cases were submitted to the court upon agreed statements of facts as contained in the pre-trial orders, and certain additional evidence adduced at the trial (Pet. 15, 24).

Both petitioners utilize similar standard forms and contracts prepared by them in advance. Both use a driver's application form. All-States also uses a contract with the owner, which states that the owner releases the car to All-States "for the purpose of selecting a reliable driver," and a lease agreement by which All-States, as "agent" for the owner, "leases" the car to the driver for the duration of the trip (Pet. 16–17). Nation-Wide's formal agreements consist of an order form, signed by the owner, which identifies the owner, car, and destination point, and a driver's agreement which purports to make the driver an "independent contractor" who contracts with the owner "for the sole purpose of delivery" of the vehicle (Pet. 25, 26).

Through the foregoing agreements, the petitioners prescribe the route and number of miles to be traveled, the date of delivery, the number of passengers who may be transported, and the responsibility for payment of such items as gasoline, oil, and minor repair bills. Although petitioners provide no personal injury or property insurance, they assume responsibility for the first $50 in damages to the car and instruct the owner, in the event of complaint, to contact petitioners immediately (Pet. 17, 19, 25–26, 28).

Petitioners collect a fee based on the distance to be traveled. A $50 deposit, which they require of the driver, is paid by the owner to the driver at destination, and the remainder of the fee is paid by the owner at the time the original agreement is made (Pet. 18–19, 27).

ARGUMENT

Section 206(a) of the Interstate Commerce Act prohibits common carriers by motor vehicle from engaging in interstate operation on a public highway without a certificate of public convenience and necessity issued by the Commission, and Section 203(c) prohibits engaging in "any for-hire transportation business by motor vehicle" in interstate commerce without Commission authorization. Section 203(a)(14) defines a "common carrier" as any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate commerce of persons or property. Almost from the inception of federal motor carrier regulation the Commission has construed these provisions as covering for-hire transportation of automobiles by so-called "driveaway" service, and has issued certificates and permits authorizing such transportation.[2] This Court implicitly recognized the validity of Commission regulation of such service in *Alton Railroad Co.* v. *United States*, 315 U.S. 15, and the holding below that such service constitutes for-hire transportation accords with the decisions of the two other district courts that have considered the issue.[3] As one of those courts

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[2] *E.g.*, *Lord Contract Carrier Application*, 34 M.C.C. 549 (1942); *Kenosha Auto Transport Corp., Common Carrier Application*, 24 M.C.C. 753 (1940); *Howard Sober, Inc., Extension*, 23 M.C.C. 80 (1940); *Fleming Contract Carrier Application*, 8 M.C.C. 469 (1938), affirmed, *sub nom. Alton R. Co.* v. *United States*, 314 U.S. 15 (1942); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619 (1938).

[3] *United States* v. *Aides, Inc.*, 211 F. Supp. 122 (E.D. Pa.); *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, Civil No. 3101, S.D. N.Y., decided February 7, 1963. The

recently explained, "a person who, continuously, as a business, arranges for, obtains or provides a driver to transport a vehicle, owned by another, in driveaway service, has assumed the characteristic burdens of the transportation business."[4] See *United States* v. *Drum*, 368 U.S. 370, 375. To deny the Commission regulatory authority over such transportation would not only cause the "diversions of traffic which may harm existing carriers" about which Congress was concerned in the Motor Carrier Act (*Drum, supra*), but could also lead to serious evasions of the safety requirements which the Commission imposes on regulated motor carriers.

Petitioners contend (Pet. 10) that "in the conduct of their auto drive-away businesses, they act only as an intermediary bringing together the private automobile owners and drivers and do not provide a transportation service." The district court's findings, which are not here challenged, refute this contention. The court found, among other things, that petitioners' advertisements constitute the holding out of an automobile transportation service (Pet. 21, 30); that the automobile owner turns his property over to petitioners for the purpose of having it delivered to its destination, and pays petitioners a charge based upon the distance to be traveled (Pet. 21, 30); that the terms and conditions of such transportation are prescribed by petitioners, and the contracts and agree-

latter decision, which is not yet reported, is set forth in the Appendix, *infra*.

[4] *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, *supra*, n. 3, App. *infra*, p. 17.

ments signed by both owner and driver are prepared by petitioners (Pet. 21, 30); that drivers are selected by petitioners, receive their instructions from petitioners, and look to them as employers (Pet. 22, 30); and that, insofar as any individual trip is concerned, the driver is in fact an agent of petitioners and under their supervision and control (Pet. 22, 31). The findings fully support the district court's conclusion that petitioners perform "substantially all the functions of transporting automobiles" (Pet. 22, 31), and hence are subject to the certificate and permit requirements of the Act.[5]

Contrary to petitioners' argument (Pet. 10), the district court properly "discounted the form of the petitioners' procedures" and considered the "true substance of the transaction" in determining whether petitioners had engaged in for-hire transportation. The claim of the petitioners that "the driver's authority to drive the owner's vehicle was derived from the direct contract between the owner and driver and that the petitioners maintained no control over the driver's operation of the vehicle once the trip had commenced"

[5] There is plainly no conflict with *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163, 165 (C.A. 10). The court there stated, by way of dictum, that "one engaged solely in furnishing drivers to drive trucks for others in the transportation of their own property on the highways, without more, is not required to obtain a certificate of convenience and necessity." In the present case, as the discussion in the text demonstrates, petitioners have not been "engaged solely in furnishing drivers," but have been engaged in the "holding out of an automobile transportation service" (Pet. 21, 30).

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(Pet. 10) cannot prevail over the real substance of what they are doing. See *United States* v. *Drum*, 368 U.S. 370; *Georgia Truck System, Inc.* v. *Interstate Commerce Commission*, 123 F. 2d 210 (C.A. 5). The district court was justified in concluding, as have other courts[6] and the Commission[7] in holding operations conducted pursuant to similar formal arrangements to constitute for-hire transportation, that "[t]he documents, agreements and contracts utilized by defendant appear to be designed to avoid the application of the provisions of the Interstate Commerce Act to the transportation performed and they are of no legal effect wherein the terms are in contradiction to the facts" (Pet. 20–21, 29).

In sum, this case involves only the correctness of the application of the statutory standards to the particular facts here involved. The courts below correctly held that petitioners' driveaway operations constituted for-hire transportation, and there is no occasion for further review of those essentially factual determinations.

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[6] See note 3, *supra*, p. 5.

[7] *Service Associates, Inc., Investigation of Operations*, 89 M.C.C. 33 (1962); *Fred D. Spencer, Investigation of Operations*, 88 M.C.C. 243 (1961), appeal pending, Civil Action No. C62–422, N.D. Ohio; *AA Auto Delivery, Inc., Common Carrier Application*, 77 M.C.C. 365 (1958); *Automotive Shippers, Inc., Common Carrier Application*, 64 M.C.C. 475 (1955).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
BETTY JO CHRISTIAN,
BERNARD A. GOULD,
Attorneys,
WILLIAM R. HARRISON,
Regional Attorney,
Interstate Commerce Commission.

MARCH 1963.

APPENDIX

In the United States District Court of the Southern District of New York

62 CIVIL 3101

INTERSTATE COMMERCE COMMISSION, PLAINTIFF,

v.

INTERSTATE AUTO SHIPPERS, INC. AND ALFRED M. RAPPEPORT, DEFENDANTS.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Appearances: Seymour Glanzer, Larsh B. Mewhinney, Attorneys for Plaintiff, Interstate Commerce Commission, 346 Broadway, New York, N.Y. H. Howard Friedman, Attorney for Defendants, 295 Madison Avenue, New York, N.Y.

LEVET, *D.J.*: This is a motion for a preliminary injunction whereby the plaintiff seeks to restrain the defendants from transporting property in interstate commerce as a common carrier by motor vehicle in violation of Section 206(a) of the Interstate Commerce Act (49 USC § 306(a)). Following service of a verified complaint and verified answer, the plaintiff, by order to show cause, brought on an application for a temporary restraining order. This court conducted a hearing on plaintiff's application and evidence was adduced.

The proposed findings of fact, conclusions of law and briefs of the parties having been received, the court, after considering the pleadings, evidence, ex-

hibits and the stipulation of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

FINDINGS OF FACT

1. The defendant corporation, of which the individual defendant is the president and sole stockholder, maintains an office and place of business in the City and County of New York, New York, within the jurisdiction of this court.

2. From sometime in 1958 to the present the defendants have been engaged in the "driveaway" business in interstate commerce.

3. "Driveaway" is a service sought by owners of automobiles, traveling to a given destination by another mode of transportation, who wish their cars delivered to that destination.

4. The defendants advertise their business to the general public in the Manhattan Yellow Pages and in The New York Times (Pl. Exs. 3 and 4 and Exs. 3, 4 and 5 attached to Clark's affidavit in Pl. Ex. 7). The Yellow Pages advertisement is contained under the heading of "automobile transporting." A quarter page advertisement holds out "Agents in Principal Cities of U.S.A.." "Insurance Arranged Drivers' Bonds Posted." "Ship Your Car at Low Rates Nationwide & Overseas Via Steamer-Rail-Driveaway." The Commercial Notice Section of The New York Times contains the following sample: "Reliable drivers, Florida, Tucson, Denver, Chicago. Immediate."

5. In response to advertising or through word of mouth, those persons who wish their automobiles delivered to nationwide destination points via "driveaway" service communicate with the defendants. If the terms and arrangements are satisfactory, car

owners enter into a series of written agreements with the defendants on printed forms provided by the defendants. While the circumstances may vary slightly depending on the car owner's needs, the transaction involving the shipment of an automobile owned by one Michael Nastacio is representative of all.

Nastacio sought to have his car transported from Brooklyn, New York to Colorado Springs, Colorado. On October 26, 1960 he entered into a driveaway agreement (Ex. 6 attached to Pl. Ex. 7) with the defendants. By its terms the defendants are authorized to act as agents for Nastacio to engage a driver for him and to deliver the automobile to destination. The agreement sets forth certain instructions to be given the driver by the defendants, including such items as the routes to be traveled, notification in case of accident, and authorization that the driver is to retain possession of the vehicle until he receives payment of the balance of delivery charges. In the event of accident the defendants agree to pay up to $50.00, if the car owner carries a collision insurance policy. Nastacio paid the defendants $115.00 on entering into the driveaway agreement.

Thereupon, on October 28, 1960, the defendants entered into a Driver Agreement with one Edward Bonville, to deliver Nastacio's car to destination. (Ex. 7 attached to Pl. Ex. 7) The agreement is signed by defendant Alfred M. Rappeport, as dispatcher for the corporate defendant. It sets forth the routes to be traveled, time allowed for delivery and defines the driver's duties and responsibility. The driver agrees to deposit $50.00 as a "bond" to be refunded upon delivery of the car, but which may be forfeited due to driver's negligence. The driver is required to telephone the defendants in case of accident or major service and await further instructions.

After the allowed time for delivery has elapsed, the defendants are permitted to take all steps necessary to recover the vehicle and the driver may forfeit his "bond."

Upon entering into the driver agreement, Rappeport and the driver signed a form entitled "Temporary In Transit Authorization", which had previously been signed by the car owner. (Pl. Ex. 5) Simultaneously, Bonville was given a post-dated check drawn by the defendants, in the sum of $50.00, as a return of his "bond" deposit.

6. On March 9, 1959, District Supervisor Tomany, plaintiff's representative, advised defendants, in writing, that its activities were those of an interstate motor common carrier of property for compensation and required authority from the Commission. (Ex. 1 attached to Pl. Ex. 7) On March 11, 1959, Mr. Rappeport advised the supervisor that he would apply to the Commission for authority and until such authority was granted he would cease all driveaway activties. On March 16, 1959, Mr. Rappeport wrote to Mr. Tomany in partial confirmation of the advice given the supervisor at the conference. (Ex. 2 attached to Pl. Ex. 7) For at least two weeks thereafter the defendants ceased to advertise their driveaway business in New York newspapers. However, Mr. Rappeport testified that the defendants never terminated their driveaway operations.

7. Rappeport testified that during 1962 the defendants entered into about 1,500 "driveaway" agreements, of which a substantial number involved interstate transactions. In many instances, unlike the Nastacio "driveaway," the car owner did not pay the entire fee in advance. On those occasions the defendants collected the difference between the agreed-upon fee and the "bond" to be deposited by the driver.

When the car was delivered, the owner would reimburse the driver in the amount of his "bond" and the defendants would retain the bond. For example, the usual fee for "driveaway" from New York City to Miami, Florida is $75.00. The owner pays $25.00 in advance to the defendants and the driver deposits $50.00 with the defendants. Upon delivery, the owner pays the driver $50.00 and the defendants retain the "bond" deposit.

8. The defendants will continue to engage in the "driveaway" business in interstate commerce without there being in force and effect a certificate of public convenience and necessity authorizing them or either of them to conduct such operations, unless restrained by this court.

DISCUSSION

The plaintiff contends that the "driveaway" operations conducted by the defendants are those of a "common carrier by motor vehicle" as defined in Section 203(a)(14) of the Interstate Commerce Act (49 USC 303(a)(14)) and that under the provisions of Section 206(a)(1) of said Act (49 USC 306 (a)(1)), no common carrier by motor vehicle shall engage in any interstate or foreign operations unless there is in force and effect a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such operations. Neither defendant has been issued any authority by the Commission.

The defendants contend they are not engaged in the business of transportation of property by motor vehicle but that their business is of such a nature as not to require authority from the plaintiff.

Rappeport claims that the defendants' fee is earned solely for "screening" drivers. The "screening" service consists primarily of photographing and fingerprinting drivers, examining identification and

being furnished with references. In order to secure drivers, the defendants advertise in the newspapers (Pl. Ex. 6) or rely upon drivers seeing their "driveaway" advertisement in the Yellow Pages. Sometimes the driver is not introduced to the owner and has had no dealing with the owner until delivery at destination. On other occasions, at the owner's request, the defendants introduce the driver to the owner.

Although Rappeport claims the defendants' fee is solely for "screening," it is noted that the fee varies in accordance with the distance to be traveled. The New York to Miami fee is about $75.00; the New York to Colorado fee was $115.00 in the Nastacio transaction; and the New York to California fee is about $125.00. Rappeport stated that the fee is determined on the basis of competitive rates and is maintained at about one-fifth that of carriers holding authority issued by the Commission.

Defendants also claim they are exempt from certification by reason of Title 49 USC § 303(b)(9) Section 303(b)(9) exempts "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * *."

The claim of exemption is without merit. The exemption of Section 303(b)(9) does not apply here because of the repetitious nature of defendants' operations. *MC116023 AA Auto Delivery Inc., Common Carrier Application* 77 M.C.C. 365. See also *Automobile Shippers, Inc.*, 64 M.C.C. 457.

Defendants are attempting to hide behind the facade of an employment agency. In a recent case, a court permanently enjoined a defendant from oper-

ating its "driveaway" service until it was certified. *Interstate Commerce Commission* v. *W. H. Dudgeon, d/b/a All States Drive-Aways Agency* (D.C. S.D. Calif.), aff'd without opinion, 9 Cir., November 16, 1962. In *Dudgeon,* many of the issues presented here were resolved in favor of the Commission. Since the present case is substantially identical with *Dudgeon,* this court is warranted in granting a preliminary injunction at this time.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter and of the defendants under the provisions of Section 222(b) of the Interstate Commerce Act (49 U.S.C. 322(b)) and Section 2 of the Elkins Act (49 U.S.C. 42).

2. Part II of the Interstate Commerce Act is a highly remedial statute and its terms are broadly comprehensive enough to bring within them all of those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire. *Georgia Truck System, Inc.* v. *Interstate Commerce Commission,* 5 Cir. 1941, 123 F. 2d 210. The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose. *McDonald* v. *Thompson,* 305 U.S. 263 (1938); *Piedmont and N. Ry. Co.* v. *Interstate Commerce Commission,* 286 U.S. 299 (1931).

3. The documents, agreements and contracts utilized by defendants appear to be designed to avoid the application of the provisions of the Interstate Commerce Act to the transportation performed and are not binding upon this court. The driveaway agreement employed by defendants wherein defendants become the car owner's agent to obtain a driver

for the trip to destination is not a bona fide agency, but is a mere subterfuge under the guise of which defendants attempt to conceal their unlawful operations.

4. The advertisements of the defendants constitute a holding out of an automobile transportation service within the meaning of Section 203(a)(14) of the Interstate Commerce Act, Part II (49 USC 303(a)(14)).

5. For each automobile transported the defendants charge and receive a definite sum of money from the owner thereof, and the receipt of such money is compensation within the meaning of Part II of the Interstate Commerce Act.

6. The test to be applied to determine whether the defendants' operations are subject to the certificate provisions of Section 206(a) of the Act (49 USC 306(a)) is whether the defendants have assumed in significant measure the characteristic burdens of the transportation business. *United States* v. *Drum*, 368 U.S. 370 (1961). The clear import of the Commission's decision in *MC116023 AA Auto Delivery, Inc. Common Carrier Application*, 77 M.C.C. 365 is that a person who, continuously, as a business, arranges for, obtains or provides a driver to transport a vehicle, owned by another, in driveaway service, has assumed the characteristic burdens of the transportation business. The defendants have assumed the characteristic burdens of the transportation business in the transportation of automobiles, in driveaway service, in interstate commerce for compensation, and are a common carrier by motor vehicle as defined in Section 203(a)(14) of the Act (49 USC 303 (a)(14)).

7. The acts of the defendants constitute violations of Section 206(a) of the Interstate Commerce Act (49 USC 306(a)) and as such are subject to be en-

joined by this court under the express provisions of Section 222(b) of said Act (49 USC 322(b)).

8. The Interstate Commerce Commission, therefore, is entitled to a preliminary injunction enjoining defendants from violating Section 206(a) of the Interstate Commerce Act (49 USC 306(a)).

Settle order on notice in accordance with Rule 65(d) of the Federal Rules of Civil Procedure.

Dated: New York, N.Y., February 7, 1963.

United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1963